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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re BRIANNA H., a Person Coming
Under the Juvenile Court Law.

B195303

(Los Angeles County
Super. Ct. No. CK56570)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

TERESA H.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County,
Joan Carney, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Orders are
affirmed.

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and
Appellant.

Raymond G. Fortner, Jr., County Counsel, Larry Cory, Assistant County
Counsel, and O. Raquel Ramirez, for Plaintiff and Respondent.

Teresa H., mother of the minor child Brianna H. (Mother and Brianna, respectively), appeals from two orders of the juvenile court made in this dependency case.¹ In one order, the court denied Mother's section 388 petition asking the court to (1) find that a guardianship would be in Brianna's best interest and (2) permit Mother to have two-hour unmonitored visits with the minor child. In the second order, the trial court, at a section 366.26 hearing, terminated Mother's parental rights and directed adoption planning and placement for Brianna.

Our review of the record shows the trial court's ruling on the section 388 petition does not constitute an abuse of discretion, and the court's section 366.26 decision is supported by substantial evidence. We will therefore affirm both orders.

BACKGROUND OF THE CASE

THE PRIOR APPEAL

This case has been before us recently. By an opinion filed on January 25, 2007, we affirmed an order of the dependency court that granted a section 388 petition filed by the Los Angeles County Department of Children and Family Services (the Department). The order changed Mother's visitation with Brianna from monitored overnight visits at the house where Mother resided, to monitored visits at a neutral location. Mother had filed her own section 388 petition at that time, seeking reinstatement of reunification services and either a home of parent order for Brianna to

¹ Dependency cases are governed by Welfare and Institutions Code, section 300 et seq. Unless otherwise indicated, all references herein to statutes are to that code.

live with her or an order permitting her unmonitored weekend visits with Brianna. That petition was denied.

The order challenged in Mother's prior appeal was made on June 26, 2006. There was strong evidence at the hearing on that day that Mother was dishonest when she asserted to the court (and asserted to a social worker on a prior day), that the minor child's father (Father) was not living at the home where Mother resided. Mother had been granted overnight visits at her residence on the condition that Father not live there because he had unresolved substance abuse issues. When the court scaled back Mother's visitation to monitored visits at a neutral location, it remarked that "they can't be trusted out of sight."²

EVENTS AFTER THE JUNE 26, 2006 HEARING

1. The July 12, 2006 Report and Hearing

Because our prior opinion sets out the history of this case from its initiation through the June 26, 2006 section 388 petition hearing, we will not repeat such history here. Rather, we begin with the Department's report for the section 366.26 hearing that was initially scheduled for July 12, 2006. The report states the minor, who was 23 months old, was meeting her developmental milestones. Carolina C., the caregiver

² The Department's May 2006 status review report stated Brianna's caregiver maternal aunt reported that after Brianna's overnight visits at Mother's home, the child had a difficult time settling down. Specifically, Brianna appeared very anxious after the visits and did not want to leave the caregiver's side. Brianna has lived with the aunt for essentially her entire life and the Department reported that the minor appeared to be bonded to the aunt and to the aunt's children, and well adjusted to her environment, and the aunt appeared to be bonded to Brianna and wished to adopt her.

maternal aunt, was found to be giving Brianna excellent care and a loving, nurturing home environment. Brianna was having separate visits with her parents at the Department's Glendora office. The visits were monitored by Department social workers. The parents were reported to be appropriate with Brianna, attentive to her needs, and interact well with her, and she in turn appeared comfortable with them, although sometimes Brianna would cry to go with the caregiver and not be able to settle down, and the parents agreed that the visits should terminate at those times. The social workers reported Brianna is very attached to the caregiver aunt.

Neither parent had completed the three parts of the case plans the court had ordered for them on September 30, 2004, which included a drug rehabilitation program, parenting classes, and individual counseling. Because of that, the Department found there was a substantial risk to Brianna if she were returned to them. Further, the Department continued to have "serious concerns" about Mother's ability to be forthcoming about case related matters and protect Brianna from Father, given the situation where, from all appearances, Father was living with Mother despite the fact that Mother had only been permitted overnight visits with Brianna at Mother's home because she had agreed to not let Father live there. The Department recommended that the parents' parental rights be terminated.

At the July 12 hearing, the matter was continued to August 22 and again to September 25 for the Department's completion and review of a home study for the caregiver aunt.

2. *Mother's Second Section 388 Petition*

a. *Purpose of Mother's Petition*

On September 20, Mother filed a second section 388 petition. She asked the court to find that guardianship rather than adoption would be in Brianna's best interests, and she asked to have two-hour unmonitored visits at a location chosen by the social worker. She stated Brianna goes to her easily at their visits, enjoys Mother's company, responds to Mother in a loving manner, and knows that Mother is her mother. She asserted Brianna's actions demonstrate a bond between the two of them and continuing their relationship would be beneficial to the minor. Mother acknowledged that the caregiver, the social worker, Brianna's attorney, and county counsel all disagree with her section 388 requests.

Mother submitted her own declaration and several exhibits to support her petition. One exhibit is a series of her own written descriptions of 15 monitored visits with Brianna that took place at the Department's office between June 1 and September 7, 2006. According to the descriptions, at each visit Mother had snacks for Brianna or they went to a restaurant. During the visits they played games, colored pictures, talked, read books, played with dolls, and some times Mother took pictures of Brianna. Other exhibits included pictures of herself and Brianna, a rental agreement to show that Mother is living alone, two paycheck stubs to show she "ha[s] a job that pays

well,” and a final examination paper from a parenting class. Only the first page of the examination was submitted by Mother, and it has an “A+” on it.³

Mother stated she finished her one-year drug rehabilitation program and her drug tests during the past year had been negative. A letter dated September 22, 2006 from El Proyecto del Barrio, signed by Raquel Sanchez, a perinatal case manager, states Mother was showing positive lifestyle changes, she had learned from her mistakes and was using them as learning experiences, she worked hard at doing what the program required of her, and she tested negative 26 times since her enrollment, with no positive tests. Regarding the case plan’s directive for individual therapy, the case manager reported that Mother had not been receiving such therapy since May because the program did not currently have a therapist.

b. *Testimony Concerning Mother’s Section 388 Petition*

The court took testimony on September 25. Mother stated that while she and Father are still married, she is “not with him” because she “lost so much from him.” He does not support her financially, she does not rely on him, and she asked one of the social workers how to obtain a divorce. However, because she and Father both have

³ A letter from Mother’s case manager at the drug treatment program states only that Mother passed the parenting class test. It does not state she received an A+ on her final exam. As noted in our prior opinion in this case, a social worker’s investigation revealed that drug education/parenting class sign-in sheets from the Twin Towers jail education department that Mother submitted to the social worker were fraudulent, and in reality Mother’s participation in the jail program was limited to one drug treatment class. When that fraud is coupled with the trial court’s remark that Mother and Father “can’t be trusted out of sight,” it raises the question whether the “A+” written on Mother’s parenting class final exam is valid.

visits with Brianna at the same Department office, Father rides with her when she goes to visit the child. Mother uses her sister's car or Father's sister's car to drive them to the visits. Initially Mother stated that her driving Father to the visits is his only way of getting to them, but when she was challenged about that statement, she then stated she did not know if he could find another way to get to his visits. Asked why the Department should trust Mother to not let Father be at unmonitored visits, Mother answered because she would not want to "screw that up for myself."

Mother stated that although she let a whole year slip by without making efforts in this case, she always cared about Brianna. She began using drugs in 2000 because she had a rough childhood. She stated she was tired of the street life and tired of going to jail, and she had "never been clean this long." She conveyed to the caretaker aunt that she wants Brianna to know she is her mother and she does not want the minor to grow up hating her. Mother felt the aunt's attitude toward her (Mother) was more positive since Mother began maintaining a clean life, however she did not think the aunt would let her see Brianna if the aunt adopts the child.

According to Mother, she graduated from high school and took classes at Pierce College in Woodland Hills for two years, studying child psychology because she wanted to become a social worker. Her current employment involves answering emergency telephone calls for doctors, deputy sheriff associations, and "family preservation," and she began that work seven months earlier. She attends AA/NA meetings even though she is no longer required to do so since she completed the drug rehabilitation program.

Mother testified Brianna calls her “Ma” when she sees her. Sometimes the minor is cranky when the visits start because she is just waking up, but the “last few weeks” Brianna ran to Mother when the minor and her caretaker arrived for the visits.

The court indicated it wanted to hear social worker Lorraine Ramirez’s reaction to Mother’s testimony. Ramirez testified she has worked on this case for approximately one and one-half years, and she is also familiar with the six months of the case that preceded her involvement in it. She stated that during the two years the case has been pending, Mother’s visits have always been monitored and Mother has never resided with Brianna.

Ramirez indicated she monitored about six of Mother’s visits during the six months preceding the hearing. Father and Mother always came together at those times. Mother brought snacks for Brianna and things for her to play with. Brianna “didn’t really engage Mom in play, but Mom did attempt to engage the child when appropriate during the visits.” Mother was “very emotional during the visits.” Ramirez did not hear the minor call Mother “Ma.” She stated it did not seem like Mother was parenting Brianna but rather the visits were like play dates for the child. Other social workers reported to Ramirez that Mother’s behavior towards Brianna was appropriate when they were the monitors for Mother’s visits.

Ramirez stated the Department is against having unmonitored contact between Mother and Brianna because the Department believes Mother permitted Father to have unmonitored contact with the minor during the minor’s overnight visits with Mother. The Department recommended the caretaker aunt adopt Brianna because the child has

been with the aunt since she was a month old and they have a mother-daughter relationship, and further, Mother may still have a relationship with Father.

c. *The Decision on the Section 388 Petition*

The court made its decision on November 22. It acknowledged Mother had made “significant and good changes” in her life which constitute a change in circumstances, but found the change in circumstances was not complete. The court stated it believed that Mother wants both Brianna *and* “Father who has failed to comply with court ordered reunification and has gone his merry way.” The court found it “patently obvious . . . that [Mother] . . . cannot and has not cut the ties [with Father].” Based on its reservations as to where Mother’s true commitment lies, and on the fact that Brianna has bonded to the caretaker and become a member of the caretaker’s family, which the court stated was due to Mother’s long waste of reunification time in this case, the court concluded it was not in Brianna’s best interest to grant Mother’s section 388 petition.

3. *The Section 366.26 Decision*

a. *Additional Testimony*

On December 6, the court heard additional testimony for the purpose of ruling on the section 366.26 matter. Mother’s attorney stated her intent was to provide the court with evidence to establish a section 366.26, subdivision (c)(1)(A) “beneficial relationship” exception so that Mother’s parental rights would not be terminated.

Social worker Maria Diaz testified Mother has visits with Brianna once a week at the Department’s office and the visits last an hour. Between June 2006 and a week

prior to the hearing, she monitored about eight of those visits and social worker Lorraine Ramirez monitored the others. Initially Brianna had difficulty adjusting to the visits. She cried and wanted to be with the caretaker aunt, and she seemed restless. Since those initial visits, things have improved and Brianna “stays with Mom with no problems.” She is more comfortable with Mother and interacts with her more. However, on one occasion the caretaker came back to the room before Mother’s visit was over and Brianna ran to the caretaker and wanted to leave the room.

Diaz stated that she, Mother, the caregiver aunt, and Brianna all meet in the lobby. Mother reaches out to Brianna and the child goes to her and gives her a hug and kiss. Diaz has not seen Brianna go to Mother without Mother first reaching out to her. After the four of them meet they walk to the visitation room and the caretaker leaves. Mother has physical contact with Brianna during the visits. She holds, hugs and kisses the child and plays with her. Brianna will give Mother a hug or a kiss when Mother asks for them but Diaz has never seen the minor do that spontaneously. Mother brings educational toys, dolls, coloring books and musical toys with her for the visits. Mother tries to teach Brianna numbers, letters and parts of the body such as face and ears. Brianna sits on Mother’s lap or on a sofa. Father’s visit with Brianna is immediately after Mother’s, and so when Father comes into the visitation room, Mother gives the minor a hug and kiss and the minor reciprocates and then goes to Father. Diaz has never seen Brianna reluctant to see Mother leave.

Social worker Lorraine Ramirez testified she began monitoring visits between Mother and Brianna in July 2006 and has monitored about 15. On two of the visits,

Mother was late and when Brianna saw Mother she was excited and ran to Mother and hugged her. She has seen Brianna interact with the caretaker's children, who are approximately seven, eight and nine years old, including witnessing their interaction within six months prior to the hearing. Brianna plays and laughs with them and they interact as siblings. Within that same time frame, the social worker witnessed Brianna's interaction with the caretaker. Brianna is very affectionate and comfortable with the aunt and seeks her out for her needs. Ramirez could not recall Mother asking her, during the last six months, about Brianna's well being, including the child's physical health, doctors visits, and developmental marks such as potty training.

Mother testified she had a relationship with Brianna early on in the minor's life in that she (Mother) lived with the caretaker aunt and Brianna and Father for about five months, and during that time she took care of Brianna.⁴ Mother stated she told the prior social worker that she was living with the aunt but the social worker did not believe her. After she stopped living with the aunt she would visit the minor at the aunt's home about three times a week and while there, would help the aunt feed and change Brianna and put her to sleep. During the few weeks of overnight visits with Brianna that the trial court permitted Mother to have at her own residence, Mother would feed the minor, change her diaper, play with her and put her to bed. Mother stated that except for a few weeks when she was incarcerated, she saw Brianna at least once a week.

⁴ From the very beginning of this case, the order of the court was for the parents to have contact with Brianna by means of monitored visitation. There was never an order permitting them to live with the minor.

b. *The Court's Section 366.26 Decisions*

On December 12, the court found by clear and convincing evidence that Brianna is likely to be adopted. (§ 366.26, subd. (c) (1).) Regarding Mother's claim to a section (c)(1)(A) exception to termination of her parental rights, the court stated that based on the evidence regarding the visits between Mother and Brianna, it could not find that the interaction between them reached what that exception requires. Finding that it would not be detrimental to Brianna to terminate the parents' parental rights, the court ordered such rights terminated. Mother filed this timely appeal from that order.

DISCUSSION

1. *Mother Has Not Demonstrated an Abuse of Discretion in the Denial of Her Section 388 Petition for Unmonitored Visitation*

A section 388 petition "lies to change or set aside any order of the juvenile court in the action from the time the child is made a dependent child of the juvenile court." (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) The petitioning party seeks to show, by a preponderance of the evidence, that (1) there is a change of circumstances or new evidence in the case, and (2) the requested modification or setting aside of a prior order would be in the minor child's best interest. (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) "The petition is addressed to the sound discretion of the juvenile court and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion." (*In re Jasmon O., supra*, 8 Cal.4th at p. 415.)

As noted above, the court stated its belief that Mother wants to have both Brianna *and* Father, and Mother is unable to cut her ties to Father even though he has

not complied with his case plan. Based on this belief concerning where Mother's true commitment lies, the court concluded it was not in Brianna's best interest to grant Mother's petition for unmonitored visitation. We find no abuse of discretion in that decision.

The record shows the trial court had found only five months earlier that Mother and Father could not "be trusted out of sight." That finding was based on evidence that Father and Mother were living at the same residence and thus Father was having unauthorized access to Brianna. The finding caused the trial court to (1) deny Mother's request, in her first section 388 petition, for *expanded visitation*, and (2) grant the Department's request that Mother's visits be *restrictively* changed from monitored at Mother's residence to monitored at a neutral location. Then, at the hearing on Mother's new section 388 petition, the court heard evidence that Father was being driven by Mother to their visits with Brianna even though Mother asserted that she was done with Father because she "had lost so much from him." Although she stated her belief that Father needed her to drive him to the visits, the record shows that at an earlier hearing Father testified he was taking public transportation to have his visits with Brianna. Moreover, in one of her written descriptions of her visits with Brianna that she included as an exhibit to support her second section 388 petition, Mother explained that on Brianna's birthday, *she and Father* brought the minor a birthday cake, clothes and a doll. Given Mother's mixed messages about her current relationship with Father, and her prior willingness to permit him visits with Brianna that were not authorized, certainly there was no abuse of discretion when the trial court refused to grant Mother's

petition to have two-hour *unmonitored* visits at a location chosen by the social worker. It was in Brianna's best interest to not be placed in a position where Mother could once again permit Father (who had never complied with his drug treatment/parenting class/individual therapy case plan), to have unauthorized access to the minor.

2. *Mother Has Not Demonstrated the Trial Court Abused Its Discretion When It Denied Her Petition for a Finding That Guardianship Would Be in Brianna's Best Interests; Nor Has She Demonstrated the Court Erred in Terminating Her Parental Rights and Proceeding to Adoption*

In addition to requesting unmonitored visits with Brianna, Mother also asked, in her section 388 petition, for a finding that a permanent plan of guardianship rather than adoption would be in Brianna's best interest. The Department's attorney asserted at the section 388 hearing that a section 388 petition, is not "a proper vehicle" for making a determination what a dependent child's permanent plan should be when the section 366.26 permanent planning hearing has not already been held. We agree with the Department. It is for that reason that we will examine together both that portion of the court's section 388 ruling, and the court's section 366.26 decision to terminate Mother's parental rights and make adoption the permanent plan for Brianna.

When reunification efforts have failed, the focus of the juvenile court changes from family preservation to providing a permanent and stable home for the dependent child. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1344; § 366.26, subd. (b).) To select a permanent plan for the minor, the court holds a section 366.26 hearing. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418.) The Legislature has declared that adoption is the preferred permanent plan for dependent minors. (§ 366.26,

subdivision (b) (1); *In re Lorenzo C.*, *supra*, 54 Cal.App.4th at p. 1344.) “Guardianship, while a more stable placement than foster care, is not irrevocable and thus falls short of the secure and permanent future the Legislature had in mind for the dependent child.” (*In re Lorenzo*, at p. 1344.)

Section 366.26, subdivision (c) (1) states that if the juvenile court finds there is clear and convincing evidence that a dependent child is adoptable, the juvenile court must terminate the parents’ parental rights “unless the court finds a *compelling reason* for determining that termination would be detrimental to the child due to one or more of the . . . circumstances [set out in subdivision (c)(1)(A) through (F)].” (Italics added.) Courts have held this provision in subdivision (c)(1) puts the burden on the parent who objects to termination of his or her parental rights to prove that at least one of the exceptions in subdivision (c)(1)(A) through (F) exists. (*In re Lorenzo*, *supra*, 54 Cal.App.4th at pp. 1343-1345; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 574.)

In the instant case, Mother contends the subdivision (c)(1)(A) exception applies to prevent her parental rights from being terminated. That exception provides that the parent must prove she or he has “maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” The (c)(1)(A) exception has been interpreted “to mean the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child

relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.” (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) The *Autumn H.* court elaborated on the (c)(1)(A) exception, saying that “[i]nteraction between natural parent and child will always confer some incidental benefit to the child. The *significant* attachment from child to parent results from the adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. [Citation.] The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation] The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.” (*Ibid*, italics added.)

A trial court's finding on a parent's claim that one or more of the exceptions in section 366.26, subdivision (c)(1)(A) through (G) exists is reviewed by an appellate court using a sufficiency of the evidence standard. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) In applying that standard, there is a presumption in favor of the trial court's finding. We review the evidence in the light most favorable to the party who prevailed on the issue of the statutory exceptions in subdivision (c)(1), we give the prevailing party the benefit of all reasonable inferences, and we resolve conflicts in the evidence in support of the trial court's finding. (*Id.* at p. 576.)

Here, there is no reason to reverse either the section 366.26 order terminating parental rights, or the section 388 decision to not find that guardianship is a proper permanent plan for Brianna. This case is yet another example of the “too little too late”

syndrome that so many parents of dependant children labor under. They fritter away the many months given to them to complete their case plan and reunite with their children, and then when reunification services are terminated and a realization sets in that their parental rights appear to be on the verge of termination, they scuttle to finish the case plan and assume an appearance of a parent ready at last to properly and safely care for their children. Generally however, their efforts really are too little or too late, or both.

That is especially true when the child is removed from the parent's care at an early age, such as occurred here. By the time of the section 366.26 hearing, the child has bonded with the persons who have seen to their every day needs—fed them their meals, chased away their colds and childhood sicknesses, settled squabbles with other children, provided them with family outings, and tucked them in bed at night. In other words, the child has bonded with people who have taken over the parental responsibilities that the child's "real" parents were not able to, or did not care to, assume. It is at such times that the "real" parents contend that terminating their parental rights would be detrimental to the child because they have maintained regular visits with the child and the child would benefit from continuing such relationship. What the real parents tend to ignore is the portion of section 366.26, subdivision (c)(1)(A) which states that the trial court must find a *compelling reason* for finding that termination of parental rights would be detrimental to the child because of the child's regular contacts with the parents.

Here, the evidence supports the trial court's finding that there is no compelling reason in this case to apply the subdivision (c)(1)(A) exception in Mother's favor. The

maternal aunt caretaker, who has been caring for Brianna essentially since the child was born, wishes to adopt her. The evidence is that Brianna interacts with the caretaker's own children as siblings do and is very bonded to the caretaker. Essentially, Brianna is part of *that* family. While the social workers who monitor Mother's visits indicated the child has become more comfortable with the visits and appears to enjoy them, neither indicated Brianna hates to leave Mother when the visits are over. Moreover, the social worker assigned to this case testified she could not recall Mother asking her, during the prior six months, about the minor's health, doctors visits and development achievements. The evidence shows that from Brianna's perspective, Mother's visits with her are similar to those between a child and an adult family friend who enjoys playing with the family's children. We cannot say the evidence shows the minor would be greatly harmed by severing Mother's parental rights.

DISPOSITION

The orders from which Mother has appealed are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.